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No. 83-
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

JAMES N. CONSTANT,
PLAINTIFF/PETITIONER
v.
THE UNITED STATES
DEFENDANT/RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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(i)

QUESTIONS PRESENTED

1. When a plaintiff/inventor seeks recovery from the United States Government pursuant to 35 U.S.C. Section 183 for damages suffered as a result of the Government's imposing a secrecy order upon plaintiff's patent application and invention covered thereby, must such plaintiff/inventor present concrete proof of actual damages in order to be awarded damages?

2. In order to recover under 35 U.S.C. Section 183, does a plaintiff bear the burden of proving that "but for" the imposition of a secrecy order the damages claimed would not have been suffered by said plaintiff/inventor, or need the plaintiff/inventor show only that the imposition of the secrecy order was a substantial factor leading to plaintiff/inventor's being damaged.

(ii)

3. Whether under 35 U.S.C. Section 183 nominal damages may be awarded to a plaintiff/inventor who is damaged as a result of the imposition of a secrecy order.

4. Whether the Court of Appeals erred in not instructing the United States Claims Court to award plaintiff/petitioner his attorneys fees incurred in getting the Secrecy Order lifted from his invention?

(iii)

PARTIES INVOLVED

The parties involved in the proceedings before the United States Court of Appeals for the Federal Circuit and before the United States Claims Court (then known as the United States Court of Claims) were and are the following:

James N. Constant, an individual, plaintiff below and petitioner herein; and

The United States, defendant below and respondent herein.

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The petitioner, James N. Constant,
plaintiff below, respectfully prays that
a writ of certiorari issue to review the
judgment of the United States Court of
Appeals for the Federal Circuit entered
in the above identified action.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, review of which is here sought, is not reported and is set forth in Appendix A. The opinion of the United States Claims Court, filed October 19, 1982, is believed to be unreported and is set forth in Appendix B. An earlier opinion of the United States Court of Claims holding that an inventor is entitled to recover damages caused by the Government's imposition of a secrecy order regardless of whether or not the inventor's patent is withheld is reported at 223 Ct. Cl. 148, 617 F. 2d 239 (1980).

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on or after June 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C Section 1254(1).

STATUTORY PROVISION INVOLVED35 U.S.C. Section 183: Right to
compensation

An applicant, his successors, assigns, or legal representatives, whose patent is withheld as herein provided, shall have the right, beginning at the date the applicant is notified that, except for such order, his application is otherwise in condition for allowance, or February 1, 1952, whichever is later, and ending six years after a patent is issued thereon, to apply to the head of any department or agency who caused the order to be issued for compensation for the damage caused by the order of secrecy and/or for the use of the invention by the Government, resulting from his disclosure. The right to compensation for use shall begin on the date of the first use of the invention by the Government. The head of the department or agency is authorized, upon the presentation of a claim, to enter into an agreement with the applicant, his successors, assigns, or legal representatives, in full settlement for the damage and/or use. This settlement agreement shall be conclusive for all purposes notwithstanding any other provision of law to the contrary. If full settlement

of the claim cannot be effected, the head of the department or agency may award and pay to such applicant, his successors, assigns, or legal representatives, a sum not exceeding 75 per centum of the sum which the head of the department or agency considers just compensation for the damage and/or use. A claimant may bring suit against the United States in the Court of Claims or in the District Court of the United States for the district in which such claimant is a resident for an amount which when added to the award shall constitute just compensation for the damage and/or use of the invention by the Government. The owner of any patent issued upon an application that was subject to a secrecy order issued pursuant to section 181 of this title, who did not apply for compensation as above provided, shall have the right, after the date of issuance of such patent, to bring suit in the Court of Claims for just compensation for the damage caused by reason of the order of secrecy and/or use by the Government of the invention resulting from his disclosure. The right to compensation for use shall begin on the date of the first use of the invention by the Government. In a suit under the provisions of this

section the United States may avail itself of all defenses it may plead in an action under section 1498 of title 28. This section shall not confer a right of action on anyone or his successors, assigns, or legal representatives who, while in the full-time employment or service of the United States, discovered, invented, or developed the invention on which the claim is based.

STATEMENT OF THE CASE

A. Statement of Facts

1. On September 22, 1969 James N. Constant filed a patent application for his invention of a system using a synthetic aperture radar for automatically identifying objects having binary coded labels affixed to them. On September 12, 1972, U.S. Patent No. 3,691,557 covering the invention was issued to plaintiff.

2. In early 1970 plaintiff initiated efforts to commercially exploit the invention, utilizing as a vehicle RCS Associates, Inc. ("RCS"), a California corporation. In this regard, bank financing was sought and numerous potential subcontractors and suppliers were contacted to ascertain their abilities to supply RCS with component parts of the system of the invention.

3. Also in 1970, plaintiff communicated with potential customers regarding the possibility of applying the invention to their needs. A large number of the potential customers responded with interest and requested further information.

4. However, on May 18, 1970, on the request of the Armed Services Patent Advisory Board, the Patent Office issued a Secrecy Order upon plaintiff's invention. Plaintiff was thus forbidden from

• publishing or disclosing his invention as set forth in the application, or any material information with respect thereto, in any way to any person not cognizant of the invention prior to the date of the Secrecy Order, under penalty of forfeiture of any patent rights in the invention and under penalty of fine or imprisonment or both. Plaintiff immediately petitioned the Patent Office to rescind the Secrecy Order. Plaintiff's petition, which was filed on or about May 23, 1970, was not acted upon by the Patent Office until April 15, 1971 (11 months later), and then the Patent Office denied plaintiff's petition. The denial of plaintiff's petition for rescission was appealed and in an Order dated August 27, 1971, the Department of Commerce rescinded the Secrecy Order.

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5. A market existed for plaintiff's invention in the railroad, container, and car rental industries, public fleets (e.g., buses and ambulances), the Post Office and manufacturing concerns. The Department of Transportation was interested in Automatic Vehicle Identification ("AVI") devices and the American Association of Railroads was interested in AVI devices.

6. Plaintiff, during the existence of the Secrecy Order, could not fully disclose his invention to potential customers and such inability to disclose was at least partially responsible for his not being able to convince potential customers to adopt his invention, or to authorize studies regarding the application of the invention for their needs. In particular, the Secrecy Order, at the time it was imposed, was of indefinite duration. As a result, potential customers

and/or sponsors were unwilling to invest in the commercial exploitation of plaintiff's invention in view of the risk of being unable to recover their investment if the Secrecy Order were not lifted. Moreover, inasmuch as plaintiff was unable to disclose his invention, banks and other sources of financing could not make the necessary evaluation of the earning potential of plaintiff's invention and other factors in connection with the commercial exploitation of plaintiff's invention.

7. The Secrecy Order was a factor in plaintiff's dealings with, inter alia, Ametek, General Motors, Emerson Electric Company, the New York Port Authority ("NYPA"), shipping lines, the Department of Transportation ("DOT"), the American Association of Railroads ("AAR"), and the Federal Railroad

Administration ("FRA"). On June 1, 1970, Ametek specifically ceased considering plaintiff's proposals after being apprised of the Secrecy Order. The AAR, which at the time was actively searching for a suitable AVI system, refused to consider plaintiff's proposal after being notified of the Secrecy Order. The DOT, the United States Post Office, the FRA, and the NYPA, all declined plaintiff's proposals after being apprised of the Secrecy Order.

8. For similar reasons, plaintiff was unable to demonstrate his equipment in the LOCATES Study, in which he had been invited to participate by the Montclair Police Department. As a result, the study findings, which had been disseminated to the police market, included no technical detail regarding plaintiff's invention. Consequently,

- plaintiff was significantly disadvantaged in attempts to sell his invention and services to the police market.

9. The Secrecy Order irreversibly delayed the manufacture of prototype and production versions of the invention. In this regard, some of plaintiff's potential suppliers, including Anderson Laboratories and Hazeltine Corporation, based on preliminary disclosures made by plaintiff, had prepared preliminary technical and price proposals. However, because of the prohibition against disclosure of his invention, plaintiff had to suspend his contacts with such suppliers before he could provide them with the additional information needed for them to consider manufacture of prototype or production equipment.

10. Plaintiff's inability to provide detailed information or to demonstrate his invention as a result of the Secrecy Order was a proximate cause of the failure of negotiations with other potential customers. In this regard, the U.S. Coast Guard, the California Highway Department and the following shipping lines, Sea-Land Service, Inc., America President Line, Pacific Far East Lines, Matson Lines, and United States, Inc., after requesting detailed information from plaintiff regarding his invention, declined to respond to his proposals which were without the requested detail because of the Secrecy Order.

11. The 15 months from May, 1970 until August, 1971, during the pendency of the Secrecy Order, were crucial as new competitive technologies were introduced during and shortly after that

time, and the head start over these technologies which plaintiff would have enjoyed, but for the Secrecy Order, was not available to plaintiff.

12. Plaintiff's right to attempt to compete in the AVI market with his invention, regardless of whether he would succeed or fail, was substantially interfered with by the Government's imposition of the Secrecy Order.

13. With regard to the amount of damages suffered by plaintiff as a result of opportunities lost due to the Secrecy Order, the proposals made to the following parties would have yielded the following profits:

- (i) Ametek - \$2,800;
- (ii) General Motors - \$960;
- (iii) The shipping lines - over \$52,000;

- (iv) Department of Transportation - \$41,817; and
- (v) Federal Railroad Administration - \$7,446.

Plaintiff's proposals provided for a salary to be paid to him at the rate of \$25,000 per year for his engineering and administrative services. Were plaintiff able to demonstrate his system for the NYPA and capture a reasonable part of the market represented by the NYPA, his anticipated profits were \$59,500.00. Had plaintiff's negotiations with Emerson Electric Company been able to be fruitful, he would have reaped royalties under his patent.

14. Conservative projections of the total AVI market available during the five year period starting in 1970 in the automobile, bus, specialty vehicle (e.g., trucks, police cars, ambulances),

container, manufacturing and postal fields exceeded two billion dollars. Plaintiff's modest share of the market during that period would have been 0.06%. The dollar value of his share would have been about \$8,900,000.00 and his profits would have been \$890,000.00.

15. The existence of the Secrecy Order prevented plaintiff from developing his share of the market.

16. Plaintiff took immediate action to mitigate damages by attempting to have the Secrecy Order rescinded. Plaintiff himself filed a petition to rescind and, when it was denied, he retained legal counsel. Plaintiff, through his legal counsel, on June 8, 1971 appealed the decision denying his petition to rescind, which appeal was successful and resulted in the lifting of the Secrecy Order.

Plaintiff expended at least \$705.40 in

legal fees in his attempt to have the Secrecy Order rescinded. Plaintiff expended 80 hours preparing his original petition to rescind the Secrecy Order; he later expended about 80 hours conferring with his legal counsel; his time was worth about \$25 per hour, or \$4,000.00 in total.

17. Plaintiff had quantifiable and certain out of pocket losses which amounted to \$62,184.00 for the years 1970 to 1977.

18. The Secrecy Order caused delay in filing corresponding foreign patent applications. Foreign markets for AVI equipment were developing in parallel to the United States market and due to the Secrecy Order, plaintiff was unable to file corresponding foreign patent applications or to compete in the foreign markets.

19. The "sensitive" technology (i.e., synthetic aperture radar) disclosed in plaintiff's patent application had been declassified over a year before plaintiff filed his application.

20. One of the reasons Congress provided for compensation for "damage for the order of secrecy" as distinct from the "damage for use by the Government" was "in view of the fear that the Government would be ordering secret a large number of inventions, the main use of which would be primarily commercial." (Hearings Report on H.R. 4687, August, 1951.)

B. Nature of the Case and Course of Proceedings

On September 11, 1978, plaintiff/petitioner James N. Constant (hereinafter sometimes referred to as "plaintiff") filed in the United States Court of Claims a suit against the United States

(hereinafter sometimes referred to as the "Government" or "defendant") for damages suffered by plaintiff as a result of the Government's imposing a Secrecy Order on plaintiff's invention. The jurisdiction of the Court of Claims was invoked under 35 U.S.C. Section 183.

The Government brought a Motion to Dismiss and, in the Alternative, for Summary Judgment on February 2, 1979 wherein the Government contended that:

- (i) the plaintiff failed to state a claim upon which relief can be granted; and
- (ii) the Court of Claims lacked jurisdiction under 35 U.S.C. Section 183 because plaintiff's patent had not been withheld by reason of the Secrecy Order.

After oral argument was heard, the Court of Claims issued its Opinion on March 19, 1980. The Court of Claims denied defendant's Motion, ruling that a patentee who suffers damage caused by the Government's imposing a secrecy order on his invention is entitled to a recover under 35 U.S.C. Section 183, regardless of whether the patentee's patent is withheld. Constant v. United States, 223 Ct. Cl. 148, 617 F. 2d 239 (1980).

Plaintiff presented its case in chief at trial held during October 15-21, 1981. Upon the close of plaintiff's case defendant moved to dismiss plaintiff's action pursuant to Court of Claims Rule 102 on the ground that, based upon the evidence presented, plaintiff had not shown a right to recover. Briefs on the Government's Motion were filed by the

Government on November 17, 1981 and by the plaintiff on February 16, 1982. On February 24, 1982 the Trial Court issued an Order granting defendant's Motion. Additional briefs were filed by both plaintiff and defendant on May 10, 1982, and defendant filed one further brief on June 16, 1982. On October 19, 1982 the Trial Court (now the United States Claims Court) issued its Opinion pursuant to which the Trial Court concluded that as a matter of law plaintiff is not entitled to recover and dismissed plaintiff's Petition.

Appeal was then made by plaintiff to the United States Court of Appeals for the Federal Circuit on the ground that the Trial Court erred as a matter of law in applying the wrong test for causation and the wrong standard of proof and erred in finding that no compensable

damages were suffered. Plaintiff filed its Brief of Appellant on March 17, 1983. The defendant filed its Brief for the Appellee on or about April 22, 1983. On May 9, 1983 plaintiff filed its Reply Brief of Appellant. The appeal was submitted to the Court of Appeals for disposition on the briefs without oral argument and on June 24, 1983 the Court of Appeals issued its Decision affirming the Trial Court and from which this Petition for Writ of Certiorari arises.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals and the judgment below of the United States Claims Court will have a chilling effect upon inventorship in this country and, further, will render Section 183 meaningless by making it a cause of action without a remedy.

Under the decision as it stands now, the Government will not be discouraged from its current haphazard, unjustified and uncontrolled practice of imposing secrecy orders on almost every patent application relating to technologies having possible military applications, despite the non-secret nature of the technology. Inventors such as the plaintiff/petitioner will either stop inventing or, if they are not discouraged from inventing, they will bypass the patent system completely to avoid the uncontrolled imposition of secrecy orders without any real possibility of compensation for damages suffered.

As it is, plaintiff and inventors like him have suffered damages as a result of secrecy orders, but have not received the compensation mandated by Congress.

I. THE COURT OF APPEALS' DECISION
IS IN CONFLICT WITH A DECISION
OF THE SUPREME COURT

The Supreme Court has affirmed that a patented invention cannot be appropriated or used by the Government without just compensation. In doing so, the Supreme Court affirms the plain and legislative meaning and the legislative intent of Section 183.

"That the Government of the United States when it grants letters patent for a new invention or discovery in the arts confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the Government itself, without just compensation, anymore than it can appropriate or use without compensation land which has been patented to a private purchaser, we have no doubt." James v. Campbell, 104 U.S. 356, 357-358 (1881).
(Emphasis added.)

35 U.S.C. 183 states:

"just compensation for the damage caused by the order of secrecy and/or use by the Government." (Emphasis added.)

A comparison of the language shows the identical remedy, "just compensation," while the grounds for recovery are for "appropriation" and "for the damage caused by the order of secrecy," respectively, as distinct from "use." It therefore appears that the Supreme Court language provides guidance regarding language in 35 U.S.C. 183 for grounds of recovery.

Thus, following the Supreme Court, if an invention is "appropriated" by a secrecy order this fact clearly establishes the Government's liability and entitles the patent owner to just compensation - notwithstanding the much narrower interpretation to 35 U.S.C. 183 which the lower courts apply so as to restrict the award due "for the damage caused by the secrecy order," and notwithstanding that Section 183 language was provided to prevent the Government from putting secrecy orders on commercial inventions.

Clearly, the Court of Appeals' and United States Claim Court's quantum of proof rule is not supported by any of the possible interpretations of Section 183. Further, the lower courts' decisions abrogate the purpose of Section 183, which is to conform with the mandate of the Fifth Amendment to provide just compensation when the government takes the property of its citizens.

II. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH A DECISION OF THE (FORMER) UNITED STATES COURT OF CLAIMS

The Court of Claims has ruled that the Government's right of eminent domain allows it to appropriate a patent so long as it pays a fair royalty to the inventor. Leesona Corp. v. United States, 599 F. 2d 958 (Court of Claims 1979). (See, also, Leesona Corp. v. United States, 198 U.S.P.Q. 4 (Ct.Ct. Tr. Div. 1978).)

A comparison of the language shows remedies "fair royalty" and "just compensation," respectively, and the identical ground for recovery "appropriation" as distinct from "use." It therefore appears the prior ruling by the Court of Claims provided guidance regarding language in 35 USC 183, for grounds of recovery, as applied to the analogous case of patent infringement, which guidance has not been followed.

III. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH THE LEGISLATIVE INTENT

Congress intended all inventors to have a remedy in Section 183. The Court of Claims, in its March 19, 1980 Opinion, noted:

The Invention Secrecy Act evidences an increased solicitude on the part of Congress for the rights of inventors whose applications are placed under secrecy orders. . . . [T]he probabilities are that Congress intended all

inventors subject to these broad restrictions and serious penalties to seek and obtain compensation for their proved losses." Constant, 617 F. 2d at 242. (Emphasis added).

The Constitutional provision which forms the basis of the statute (Art. 1, Section 8) specifies "inventors" and not "some inventors," which would be the result if the Trial Court's decision is upheld.

Recovery is the objective of Section 183. The Court of Claims, in its March 19, 1980 Opinion, noted:

"Recovery for the consequences of the secrecy order appears to be a more important element in the objectives and structure of the statute" Constant, 617 F. 2d at 243.

Congress added the words "damage caused by reason of the order of secrecy" for the sole purpose of preventing the Government from putting secrecy orders on commercial applications which it does

not use and, thereby, greatly expanding the grounds for recovery beyond "use." The Congressional intent of "damage caused by reason of the order of secrecy" is admitted to by the Government.

Referring to the Hearing:

"There is a second element of possible liability to the Government, and that is the damage for the order of secrecy as distinct for the damage for use by the Government. That provision was put in the original act in 1940, in view of the fear that the Government would be ordering secret a large number of inventions, the main use of which would be primarily commercial. (Mr. Federico, page 32.)

Clearly, the legislative purpose of the words "damage caused by reason of the order of secrecy" was to suppress the mischief by the Government, namely of putting secrecy orders on commercial applications which it does not use and, thereby, to advance the remedy to all inventors beyond "use."

Recently, Congress has questioned the Government's narrow interpretation of the statute, the burden the patent applicant bears of determining the market value of his property in support of a claim for compensation, and has expressed the need to strengthen the applicant's right to receive just compensation.

See Part I, "Invention Secrecy" of "The Government's Classification of Private Ideas," "Thirty Fourth Report by the Committee on Government Operations"

House Report 96-1540, 96th Congress, 2nd Session 1980 (244 pages), wherein the following may be found:

Page 7. The Government's position is that the applicant suffers no damages, claims are speculative since the applicant has no market by which to substantiate the claimed value of an invention the secrecy order is incapable of inflicting damages in and of itself, etc.

Page 20. In David Pelton Moore v. U.S. in which a decision is pending (as of 1979/80), plaintiff makes the argument "the secrecy order had the effect of killing deals," etc.

Page 28. It is not clear whether the patent applicant bears the entire burden of determining the market value of his intellectual property in support of a claim for compensation, as the owner of real property does in an eminent domain proceeding, or how this value can be determined, for inventions having commercial potential when the applicant is barred by the Secrecy Order from disclosing the invention to a prospective licensee. . . raises the question of how a person having no knowledge of the invention can be told enough about it to elicit his interest.

Page 29. Provides some examples of compensation practice on 35 U.S.C. 183.

IV. THE COURT OF APPEALS DECISION
INTERPRETS SECTION 183 IN A
MANNER WHICH CONFLICTS WITH
THE CONSTITUTION

Article I, Section 8 of the Constitution provides that :

"The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The interpretation applied to Section 183 by the lower courts has emasculated the clear action of Congress in securing for inventors compensation for injuries to their right to practice their inventions caused by the Government's imposition of secrecy orders.

V. THE COURT OF APPEALS INCORRECTLY
INTERPRETED THE REQUIREMENTS OF
THE STATUTE

In Constant v. United States, 617 F. 2d 239 (Ct. Cl. 1980), the Court held that James Constant is entitled to just compensation for damages caused by the imposition of the Secrecy Order. Plaintiff contends that the purpose of the trial in this case was to determine the amount of just compensation, defendant's liability under 35 U.S.C. Section 183 having already been established.

It is a universally accepted maxim that statutes should be interpreted to effectuate their manifest purposes and that remedial statutes should be liberally construed to effectuate the remedial purpose for which they were enacted. In re Carlson, 292 F. Supp. 778 (C.D.Cal. 1968).

As recognized by the Court of Claims this maxim equally holds true to remedial legislation authorizing recovery against the United States. In White v. United States, 102 F. Supp. 585, 586 (Ct. Cl. 1952), the Court of Claims stated that statutes comprising "remedial legislation . . . are to be liberally construed." See, also, 3 C. Sands, Statutes and Statutory Construction, Section 62.02, 4th Ed. (Callaghan & Co. 1972).

As recognized in Constant, supra, at p. 242, Section 183 is remedial as it evidences "an increased solicitude on the part of Congress for the rights of inventors whose applications are placed under secrecy orders."

In view of the foregoing, it is plain that 35 U.S.C. Section 183, and all doubtful issues arising thereunder, should be liberally construed against

the Government and in favor of plaintiff who, as an inventor whose patent application was subject to a secrecy order, is part of the class intended to be benefitted by the statute. The Government, recognizing that a secrecy order is placed on a patent application just when commercial development of the subject invention is beginning, that is, at a time when the marketability, licensing and the commercial exploitation of the invention in general is inherently uncertain, has seized upon these circumstances to attempt to avoid paying compensation on the ground that it is uncertain that the secrecy order is the cause of the commercial failure of the invention, and even if it were, the amount of damages caused thereby is too uncertain to justify any award.

The Trial Court's Opinion and the Court of Appeals for the Federal Circuit's Decision supports the Government's position. If the Decision is upheld, virtually no inventor could recover damages, a result Congress certainly did not intend. Remedial statute 35 U.S.C. 183, and the issues arising under it, therefore, must instead be construed so that such inventors do obtain the just compensation provided for by Congress.

Under the Court of Appeal's and United States Claims Court's Decision, plaintiff, and all other inventors in similar circumstances will not be able to recover under Section 183 on any theory. Plaintiff respectfully submits that Congress did not intend that Section 183, when applied to the realities of the commercial and business world, should

operate so as to effectively bar the foregoing class of plaintiffs from the remedial benefits afforded by the statute.

Plaintiff's theories of recovery are as follows:

- (i) interference with business opportunities;
- (ii) expenses incurred in attempting to mitigate damages;
- (iii) out of pocket losses;
- (iv) interference with the right to compete; and
- (v) damages arising from plaintiff's being precluded from filing foreign patents.

The correct construction of Section 183, is one which establishes a remedy for all plaintiffs who come within the remedial ambit of the statute. The intent of Congress is fulfilled for all invention-owners if compensation is based on:

1. Nominal damages caused, per se, by the imposition of a secrecy order upon a patentable invention;
2. Damages suffered as shown by plaintiff's proof; and
3. Plaintiff's attorneys fees in getting the secrecy order lifted.

Plaintiff respectfully submits that he presented clear and convincing evidence to prove that the Secrecy Order was a substantive factor in causing his failure to commercially exploit the invention, and that he had suffered damages, and therefore, he is entitled to compensation, both by per se nominal damages and by an award to recompense him for his proven damages.

Therefore, the Supreme Court of the United States should grant the petition for writ of certiorari so that the Court may provide a clear statement of con-

trolling principals to guide the Court of Appeals for the Federal Circuit, the United States Claims Court, as well as inventors such as the plaintiff/petitioner.

CONCLUSION

35 U.S.C. Section 183 was enacted by Congress to provide a remedy to inventors such as the plaintiff/petitioner herein. However, the decisions below of the Court of Appeals for the Federal Circuit and the United States Claims Court have made such a remedy virtually impossible to attain. That is, inventors who are first in the process of commercially exploiting their inventions which are made the subject of secrecy orders face a virtually impossible barrier to obtaining the recovery intended by Section 183. This barrier comprises the lower courts' requirements that concrete evidence

of actual damages be presented and that the inventors show that but for the secrecy order the claimed damages would not have been suffered.

The courts below applied an interpretation of the statute which is not in harmony with the statute itself or the intent of Congress, and which interpretation is in conflict with the decisions of the Supreme Court and the Court of Claims.

The interpretation of Section 183 is very important, for it will provide guidance not only for the lower courts, but also for inventors and the Government as well.

In view of the foregoing, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JAMES N. CONSTANT,)
Plaintiff-Appellant,)
v.)) Appeal No. 83-608
THE UNITED STATES,)
Defendant-Appellee.)

DECIDED: June 24, 1983

Before MARKEY, Chief Judge, DAVIS and
MILLER, Circuit Judges. DAVIS, CIRCUIT
JUDGE.

DECISION

The judgment of the United States Claims Court, holding that plaintiff-appellant is not entitled to recover for damage or loss through imposition of a secrecy order on his invention, is affirmed.

OPINION

In James N. Constant v. United States, 617 F. 2d 239 (1980), the Court of Claims held that plaintiff-appellant was entitled (under 25 U.S.C. Section 183) to prove that he suffered damage or loss through imposition of a secrecy order (under 35 U.S.C. Section 181) on his invention of a method of encoding radar signals. The case was remanded to the Trial Division of that court and the plaintiff presented his evidence before then Trial Judge Seto. After the trial judges of the Court of Claims became

judges of the Claims Court on October 1, 1982, Judge Seto granted appellee's motion to dismiss the case for insufficiency of plaintiff's evidence. On behalf of the Claims Court the judge issued an opinion and findings holding that Mr. Constant had failed to prove such damages. The latter has appealed and we now reject his claims of error.

1. The contention that the Claims Court imposed too exacting a standard of proof is unavailing because the opinion of the Court of Claims, permitting appellant to go forward with his proof, plainly indicated that recovery should not be allowed in the absence of "actual" or "concrete" or "proven" damages; "purely speculative damages" are not enough. 617 F. 2d at 244. Judge Seto utilized that very standard which was, of course, binding on him and is binding on this panel.

2. The burden of showing such damages was properly imposed on appellant as the claimant for compensation under 35 U.S.C. Section 183.

3. The trial judge carefully evaluated appellant's evidence in detail in the court's opinion and findings. Under any proper standard of review of Claims Court decisions, this appellate court cannot overturn those factual determinations which are adequately based on the record. Appellant says that, at the least, he has proved nominal damages. Even if we assume that to be so, and also that (contrary to Constant v. United States, supra) nominal damages would be sufficient under 35 U.S.C. Section 183, the Claims Court, as successor to the Court of Claims, cannot award nominal damages. Nortz v. United States, 294 U.S. 317, 327 (1935).

APPENDIX B

UNITED STATES CLAIMS COURT

No. 406-78

(Filed: October 19, 1982)

JAMES N. CONSTANT) Patents; imposition of
v.) secrecy order; Inven-
THE UNITED STATES) tion Secrecy Act;
) proof of damages; dis-
) missal of action pur-
) suant to Rule 102(c)
) for insufficiency
) of evidence.

Irvin A. Lavine, attorney of record,
for plaintiff. Norman Zafman and Ira M.
Siegel, of counsel.

William O. Geny, with whom was
Assistant Attorney General J. Paul
McGrath, for defendant. Vito J. DiPietro,
of counsel.

OPINION

SETO, Judge: The plaintiff in this action, James N. Constant, seeks compensation for certain damages allegedly caused by the imposition of a secrecy order under 35 U.S.C. Section 181.(1) The secrecy order in question was imposed during the prosecution of plaintiff's U.S. patent application Serial No. 870,598. During the 15-month period in which the order was in effect, plaintiff was not permitted to disclose the details of his invention to certain classes of persons. Following rescission of the secrecy order, plaintiff's application, titled "System for Identifying Objects Using an Encoding Array for Each Object," issued as U.S. Patent No. 3,691,557 (the '557 patent).

(1) Chapter 17 of the Patent Act of 1952, 66 Stat. 805, 35 U.S.C. Section 181, et seq., is frequently referred to as the Invention Secrecy Act.

The '557 patent teaches the combination of a synthetic aperture radar and an object label consisting of a binary-coded dipole array. In an embodiment of the invention directed to the task of automatic vehicle identification (AVI), the coded dipole label is affixed to the vehicle to be identified. As the vehicle and label move in an azimuthal direction relative to the radar, the dipole array is scanned by the radar, producing a reflected sequence of pulses which can be detected and decoded to provide vehicle identification information.

In accordance with 35 U.S.C. Section 181, the Commissioner of Patents and Trademarks is authorized, upon the recommendation of a specified federal agency, to withhold the grant of a patent and to order that an invention be kept secret in the interest of national

security. 35 U.S.C. Section 183 provides a remedy for a patent owner affected by a secrecy order. This section provides, inter alia, that the owner of a patent which has been issued upon an application that was subject to a secrecy order may " * * * bring suit in the Court of Claims⁽²⁾ for just compensation for damage caused by the order of secrecy * * *." 35 U.S.C. Section 183; Constant v. United States, 223 Ct. Cl. 148, 617 F.2d 239 (1980).

Plaintiff filed the subject patent application Serial No. 870,598 on September 22, 1969. The secrecy order was imposed on May 18, 1970, as a result of the recommendation of the Armed Services Patent Advisory Board. On August 27,

(2) Now the U.S. Claims Court, see Pub. L. No. 97-164, 96 Stat. 25 (Apr. 2, 1982).

1971, following petition and appeal,⁽³⁾ the secrecy order was rescinded. On December 10, 1971, a notice of allowance was mailed to plaintiff, and the '557 patent issued on September 12, 1972.

On September 11, 1978, plaintiff filed suit in the Court of Claims pursuant to 35 U.S.C. Section 183. On February 2, 1979, defendant moved for summary judgment, contending that the Court of Claims lacked jurisdiction to award damages where the issuance of a patent had not been delayed by the imposition of a secrecy order. On March 19, 1980, the court denied defendant's motion, noted jurisdiction, and remanded the case for trial.

(3) See 35 U.S.C. Section 81; 37 C.F.R. Sections 5.4, 5.8.

As an aside, the court addressed the quantum of proof required for recovery under the statute. On the basis of the legislative history, the court noted:

We think the consensus at the hearing was that neither the courts nor the administrative agencies would permit purely speculative damages, but that there would have to be "real concrete evidence of damage," * * *, "actual damages" * * *, proven damages * * *, or "perhaps a greater degree of proof or ability to prove damages." That general expectation and admonition should, of course, be respected. Constant, supra, 223 Ct. Cl. at 159, 617 F. 2d at 244. [See Hearings on H.R. 4687 before Subcommittee No. 3, Committee on the Judiciary, 82d Cong., 1st Sess. 17, 18, 21, 22, 23, 28, 32 (1951).]

According to plaintiff's theory of the case, the time period during which the secrecy order was in force was a critical time in the development of AVI systems. Since plaintiff was precluded from disclosing the details of his inven-

tion to potential licensees, purchasers, or sources of financing for his invention, plaintiff asserts that he was placed at a competitive disadvantage relative to other developers of AVI systems. By the time the order was rescinded, plaintiff contends that the opportunity for an entrepreneur to enter the AVI market had vanished, due to the entry of major corporations with sufficient resources to overwhelm competitors with limited funding.

Plaintiff seeks damages in five general categories: (1) profits lost as a result of interference with business opportunities; (2) expenses incurred in attempts to obtain rescission of the secrecy order; (3) out-of-pocket business losses; (4) damages for interference with plaintiff's right to compete in the AVI market; and (5) damages resulting from delays in filing foreign patent applications.

Trial was held in Los Angeles, California, between October 15 and 21, 1981. Plaintiff testified as the only witness. At the conclusion of plaintiff's case-in-chief, defendant moved to dismiss the case under Rule 102(c),⁽⁴⁾ on the basis that plaintiff had failed to demonstrate a right to recovery as a matter of law. Following a review of the memoranda submitted in support of and in opposition to defendant's motion, defendant's motion was allowed on February 24, 1982.

In considering defendant's motion to dismiss on the ground of insufficiency of evidence, the court may evaluate plaintiff's evidence in the same manner as if both parties had presented their

(4) See old Court of Claims Rule 102 (c), now superseded by new Court of Claims Rule 41(b).

cases and rested. The court may draw such inferences as the evidence and logic will permit, but must dismiss plaintiff's petition if plaintiff has failed to demonstrate any right to recovery. See Howard Industries, Inc. v. United States, 126 Ct. Cl. 283, 115 F. Supp. 481 (1953).

Court of Claims Rule 102(c) finds its counterpart in Rule 41(b) of the Federal Rules of Civil Procedure. Applying Rule 41(b), one court noted:

"The court as the trier of fact in a non-jury action is not required to give any special preference to plaintiff's evidence on the motion to dismiss at the close of plaintiff's case. Rather, the court on a Rule 41(b) motion shall make an unbiased consideration of all the evidence, direct and circumstantial, and accord the evidence such weight as the court believes the evidence deserves. Havelick v. Julius Wiles Sons & Co., Inc., 445 F. Supp. 919, 925 (S.D.N.Y. 1978). [See also,

Woods v. North American Rockwell Corp., 480 F.2d 644 (10th Cir. 1973); Rutledge v. Electric Hose & Rubber Co., 511 F. 2d 668 (9th Cir. 1975); Moore's federal Practice 41.13[3]).

I. BACKGROUND

James N. Constant is an acknowledged expert in the field of radar technology, with numerous U.S. patents and other technical publications to his credit. Although the majority of Mr. Constant's professional work has been devoted to military applications of radar technology, Mr. Constant conceived a unique application for a technology known as synthetic aperture radar in the late 1960's. In this concept, the radar transmitter scanned a dipole array which could be coded to uniquely identify the object to which the dipole array was affixed. Such a system might be used as part of

an automatic identification system for moving vehicles, shipping containers, packages, or components moving along an assembly line.

Among the possible AVI applications foreseen by Mr. Constant were AVI systems for railroad rolling stock, trucks, buses, automobiles, and the large shipping containers employed by containerized ocean-shipping lines. A particular advantage of a system based upon microwave reflection and detection, such as that contemplated by the '557 patent, is the relative immunity of such a system to the interference caused by dust, dirt, precipitation, smoke, or other environmental conditions which tend to obscure labels designed to be scanned optically.

Mr. Constant reduced the '557 invention to practice on September 22, 1969, by filing a patent application. On May 18, 1970, a secrecy order was imposed against the contents of the patent application, following a review of the application by the Armed Services Patent Advisory Board. This was an unexpected development from Mr. Constant's point of view, since Mr. Constant was aware that synthetic aperture radar technology had been declassified prior to the filing of the patent application.

The secrecy order forbade disclosure of the contents of the '557 patent application, or any material information relating to the invention, to any person not cognizant of the invention prior to the date the secrecy order was imposed. The conceivable penalties for failure to

abide by the terms of a secrecy order are severe, and may include forfeiture of all patent rights, fines, and imprisonment.(5)

A disclosure permit, designated "Permit A," accompanied the order. This permit authorized the disclosure of the '557 invention to the following classes of persons:

(a) Any officer or employee of any department, independent agency, or bureau of the government of the United States; or

(b) Any person authorized specifically by the head of any department, independent agency, or bureau of the Government of the United States, or by his duly authorized subordinate, as a proper individual to receive the disclosure of the above indicated application.

(5) See 35 U.S.C. Section 182, 185, 186.

On May 23, 1970, plaintiff filed a petition with the Commissioner of Patents requesting the immediate rescission of the secrecy order. However, no action was apparently taken on this request until April 15, 1971, when plaintiff was informed that his petition had been denied.

As a result of a subsequent request by plaintiff, a permit was issued on April 26, 1971, authorizing plaintiff to disclose the contents of the application to legal counsel. On June 8, 1971, plaintiff, by counsel, appealed the denial of his petition for rescission of the secrecy order to the Secretary of Commerce. On August 27, 1971, the secrecy order was rescinded, and prosecution of the '557 patent application was continued. On September 12, 1972, the '557 patent issued.

As a vehicle for the commercial exploitation of his inventions, Mr. Constant established RCS Associates, Inc. (RCS) in 1967. Mr. Constant continues to be the sole owner of the stock of RCS, which was incorporated in California in 1968. The principal business office for RCS is located in Mr. Constant's home in Claremont, California.

After the filing of the '557 patent application, plaintiff initiated several efforts directed to developing and commercializing plaintiff's AVI concepts. These efforts may be grouped into three areas. First, plaintiff contacted banks and the Small Business Administration, seeking to finance the operating expenses of RCS Associates during the development of a prototype of the '557 invention. Second, plaintiff investigated suppliers

of electronic components and companies capable of manufacturing AVI systems under subcontract. Third, plaintiff mailed a number of unsolicited proposals to parties who, in plaintiff's estimation, appeared to be logical potential users of commercial embodiments of the '557 invention.

Plaintiff's search for financing for RCs consisted of writing letters to the Small Business Administration (SBA), Bank of America, and Inland Bank. Plaintiff has alleged that the imposition of the secrecy order "thwarted" these attempts to obtain bank loans. However, the record does not support this contention.

On September 25, 1970, plaintiff mailed a "business plan" to Bank of America, requesting a loan under the SBA 90-percent loan guarantee program, of \$75,000, with a disbursement schedule of

\$25,000 per month, for 3 months. The business plan described RCS Associates, plaintiff's AVI concepts, and other lines of business envisioned by plaintiff. As security for the loan, RCS offered an "assignment of customer contract." The business plan stated that this "customer contract," which allegedly involved a feasibility study for the National Aero-nautics and Space Administration, was to be awarded on October 15, 1970. However, this "contract" was, in fact, never awarded; neither were the other "proposed contracts" described in the business plan. In any event, on September 29, 1970, 4 days after plaintiff submitted his "business plan, " an officer of the Bank of America branch in Claremont, California, declined plaintiff's request for financing, without mentioning the secrecy order.

On September 30, 1970, plaintiff filed his "business plan" with Inland Bank in Claremont, California. On October 19, 1970, Otto B. Christian, Vice President of the bank, informed plaintiff by letter that his request for financing had been declined. Again, no mention was made of the secrecy order. Moreover, Mr. Christian's letter indicates that plaintiff was unable to secure financing from Inland Bank for more fundamental business reasons. Mr. Christian informed plaintiff that, in his view, the RCS proposal amounted to a request for equity financing, which would not have been a proper use of bank funds.

Thus, the record does not support plaintiff's allegations that the secrecy order impeded his efforts to obtain financing for the development of the '557 invention. The record does suggest,

however, that both Inland Bank and Bank of America were unwilling to discuss the possibility of a business loan with a company without tangible assets, without a single contract, and without operating experience in each of the lines of business proposed in the RCS "business plan."

During the spring of 1970, plaintiff sought information from various suppliers of electronic components regarding the price of the parts needed to fabricate a prototype of the '557 invention. Plaintiff obtained tentative pricing information from several suppliers, but no investment in supplies or equipment took place prior to or during the period in which the secrecy order was in effect.

Also in the spring of 1970, plaintiff began a letter-writing campaign in which he mailed, on RCS letterhead, a number of unsolicited proposals describing plain-

tiff's AVI concept to various companies. Although plaintiff did not have a working prototype of the '557 invention, plaintiff proposed that RCS conduct studies of customer needs, to be followed by prototype development. Although a number of companies indicated initial interest, no contracts or offers of contracts resulted from this correspondence. While plaintiff informed these companies of the imposition of the secrecy order, no letter from any company cited the secrecy order as an element affecting their decision to do, or not do, business with RCS. In addition, plaintiff called no witnesses from any of these companies to corroborate his allegations that the secrecy order interfered with his efforts to sell or license technology embodying the '557 invention.

On March 14, 1970, plaintiff submitted an unsolicited proposal to the American Association of Railroads (AAR) in which he outlined a "feasibility study" of the application of the '557 invention to the task of automatically identifying railroad rolling stock. On May 23, 1970, plaintiff informed AAR by letter that the secrecy order had been entered. On May 29, 1970, AAR returned plaintiff's proposal, and informed plaintiff that AAR could not support the proposed feasibility study. Although the letter from AAR stated that the proposal was being returned due to the secrecy order, there is no evidence in the record, other than plaintiff's own testimony, which would suggest that AAR was prepared to fund plaintiff's proposal.

Plaintiff's own documentary evidence demonstrates that at the time plaintiff proposed his version of an AVI system for identification of rolling stock, the AAR and its constituent railroads were committed to the installation of an AVI system known as the Sylvania Optical Automatic Car Identification System, or ACI. This system had been adopted in 1967, and during 1970, virtually all United States railroads were engaged in the installation of the optical labels required by the Sylvania system. According to a later study, which was entered into evidence, 92 percent of the freight cars sampled in July 1971 had been labeled with the Sylvania ACI optical labels.

Plaintiff's testimony suggests that the '557 invention, as applied to the task of automatically identifying railroad cars, incorporates advantages

not found in the Sylvania ACI system. However, it is apparent that the U.S. railroad industry did not constitute a ready market for plaintiff's invention during the period in which the secrecy order was in effect.

On April 10, 1970, plaintiff wrote to the Port of New York Authority, seeking the appropriate persons to whom a proposal for an AVI system, adapted to bus identification, could be forwarded. Eventually, plaintiff submitted a detailed proposal. On November 24, 1971, plaintiff was invited to participate in a demonstration of his AVI system during a series of tests of various automatic bus identification systems. However, plaintiff was unable to construct and demonstrate a prototype prior to the deadline of March 15, 1972, established by the Port of New York Authority.

During the spring and summer of 1970, plaintiff initiated contacts with representatives of a number of United States containerized shipping lines. These companies included the Pacific Far East Line, American President Lines, Matson Lines, Sea-Land Service, Inc., and United States Lines. In each case plaintiff described the benefits which the '557 invention could provide in the context of automatic container identification, and briefly described the technical parameters of the '557 invention in a manner which did not disclose the information protected by the secrecy order. In the case of the Pacific Far East Line, plaintiff submitted a proposal for the construction of a prototype. However, no contracts or offers of contracts resulted from these discussions.

At trial, plaintiff testified that he believed that the secrecy order was a factor which impeded his ability to sell or license the '557 invention to the shipping lines. However, he did not elucidate the basis for this belief, nor present any corroborating evidence or testimony to substantiate this allegation.

In 1970, plaintiff also described the merits of the '557 invention in unsolicited proposals submitted to the Federal Highway Administration, the Federal Railroad Administration, and the Post Office Department. Each proposal set forth plans for feasibility studies directed to analyses of applications of the '557 invention to identify vehicles, railroad cars, or package or letter mail. Since these agencies were permissible recipients of the information protected by the secrecy order under "Permit A,"

the secrecy order did not affect the scope of disclosure in these cases.

However, none of these agencies pursued plaintiff's proposals beyond the preliminary evaluation stage.

On July 30, 1970, plaintiff was invited to submit a proposal for an Automatic Vehicle Monitoring System to the Office of the Secretary of Transportation. Plaintiff responded with a technical and business proposal, which was submitted on August 17, 1970.

However, on December 28, 1970, plaintiff was informed that his proposal had been rejected. The contracting officer informed plaintiff by letter that the agency review process had determined that plaintiff's system, as proposed, did not appear to be within "the zone of technical superiority being considered for further negotiation."

In the case of each of these agencies, plaintiff has alleged that the secrecy order was a factor which substantially impeded his efforts at developing the '557 invention and obtaining further funding for the construction of a prototype. However, other than plaintiff's ipse dixit, no evidence was presented which would corroborate or support these contentions.

In the time period between September 1971 and the first months of 1973, plaintiff constructed a physical prototype of the '557 invention. However, no evidence was adduced which would indicate that the system actually operated in accordance with the patent specification, or in accordance with the representations made by plaintiff to the various parties to whom unsolicited proposals were sent.

In 1973, the United States Army Mobility Equipment Research and Development Center issued a Request for Quotations, seeking bids for the development of a system for automatically identifying and monitoring containerized shipments of military equipment. Plaintiff submitted a proposal for consideration, which was subsequently rejected as non-responsive, incomplete, and unacceptable under the terms of the Request for Quotations.

After 1973, no serious efforts were undertaken by plaintiff or by RCS to enter the automatic vehicle identification or monitoring markets, to the extent that they existed.

II. Plaintiff's Claimed Damages

1. Interference With Business Opportunities

As compensation for the interference with plaintiff's attempts to commercialize the '557 invention during the period in which the secrecy order was in effect, plaintiff seeks an award of \$165,523. Of this sum, plaintiff asserts that \$105,023 would have been earned as profit as a result of the performance of studies which were the subject of unsolicited proposals submitted to Ametek, Inc., General Motors, the various shipping lines, the Department of Transportation, and the Federal Railroad Administration. The remainder, plaintiff asserts, would have been earned as profit if plaintiff were able to capture a "reasonable part" of the market represented by the purchase of automatic vehicle identification systems by the Port of New York Authority.

These conjectural and speculative claims must be rejected in toto. Apart from plaintiff's own conclusory ipse dixit testimony, the record is devoid of any probative evidence tending to show that the companies alleged to be potential "customers" were interested in plaintiff's unsolicited proposals, or that the secrecy order interfered with plaintiff's attempts to sell his system to these various companies and agencies. In the case of Ametek, General Motors, and the shipping lines, the court could infer that these alleged "customers" were initially interested in plaintiff's invention, but beyond evidence of a preliminary exchange of correspondence, the record is silent. No witnesses from these companies were subpoenaed, nor did plaintiff offer any document which would suggest that these companies were prepared to accept plain-

tiff's services. Similarly, no letters or other documents were offered which would tend to show that the secrecy order was a factor leading to the rejection of plaintiff's proposals.

In the case of the Department of Transportation and the Federal Railroad Administration, the secrecy order did not impair plaintiff's ability to disclose the contents of the '557 patent application to these agencies. "Permit A" clearly authorized the disclosure of plaintiff's invention to agencies of the Federal Government.

In the case of the Port of New York Authority, the record demonstrates only that plaintiff was unable to demonstrate his invention prior to the deadline imposed by the PNYA. Although plaintiff asserts that the secrecy order was a

cause of plaintiff's inability to construct a prototype prior to the deadline, the record does not provide any foundation for this assertion.

Plaintiff's evidence strongly suggests that factors other than the imposition of the secrecy order were responsible for plaintiff's failure to find buyers for the '557 invention. First, the record indicates that, apart from the purchase of the Sylvania ACI system by the railroads prior to the filing of the '557 patent application, no market for automatic vehicle identification systems has ever developed in this country. Although the railroads, the Port of New York Authority, and the Army have experimented with certain applications of automatic vehicle identification, these experiments took place either prior to or after the period in which the secrecy order was in effect.

Second, the system which plaintiff was attempting to sell had neither been constructed nor tested prior to the rescission of the secrecy order. Third, the appearance of the various business plans, proposals, and presentations which plaintiff introduced into evidence lead to the impression that plaintiff's lack of business experience was a serious impediment to his success.

Finally, it should be noted that at no time did plaintiff petition the Commissioner of Patents for a permit to disclose the contents of the '557 application to persons other than those listed in "Permit A." 37 C.F.R. Section 5.5 specifically provides for the issuance of such a permit or the modification of the secrecy order in appropriate circumstances.

On this record, the court concludes that plaintiff has failed to demonstrate "actual damages, " or to present the "concrete evidence of damages" required for recovery under 35 U.S.C. Section 183.

James N. Constant v. United States, 223 Ct. Cl. 148, 159, 617 F. 2d 239, 244 (1980).

2. Expenses Incurred in Plaintiff's Attempts to Obtain Rescission of the Secrecy Order

The record indicates that the secrecy order in question was mailed from the U.S. Patent Office to plaintiff's California residence on May 18, 1970. Plaintiff immediately prepared a "Petition to Remove Secrecy Order," dated May 23, 1970, which was received in the U.S. Patent Office mailroom on May 25, 1970. At trial, plaintiff testified that he devoted "80 hours" of his time to preparation of this petition.

In addition, plaintiff claims that he devoted another 80 hours to consultations with legal counsel prior to the filing of an appeal with the Secretary of Commerce in relation to the denial of plaintiff's petition for rescission. Plaintiff testified that his time was valued at \$25 per hour, for a total of \$4,000. In addition, plaintiff produced cancelled checks endorsed by the law firm of Harris, Kiech, Russell and Kern, payee, totaling \$705.40. Plaintiff testified that these checks represented payment by plaintiff for legal services rendered in association with plaintiff's attempts to obtain rescission of the secrecy order.

The reasonableness of these expense claims need not be addressed, since the court concluded that attorney's fees and other expenses incurred in contesting

the imposition of the secrecy order are not recoverable under 35 U.S.C. Section 183.

This court has repeatedly held that litigation expenses, regardless of allocation, may not be awarded against the United States in the absence of specific statutory authorization. See, e.g., Kania v. United States, 227 Ct. Cl. ___, 650 F. 2d 264, cert. denied, 454 U.S. 895 (1981). 35 U.S.C. Section 183 does not specifically provide for the reimbursement of legal or other expenses incurred in contesting secrecy orders, nor does the legislative history indicate that Congress intended to include such expenses within the ambit of damages recoverable under the statute. Hearings on H.R. 4687 before Subcommittee No. 3, Committee on the Judiciary, 82d Cong., 1st Sess. (1951).

3. Business Losses of RCS Associates, Inc.

At trial, plaintiff testified that his personal corporation, RCS Associates, Inc. incurred business losses totaling \$62,184 during the years 1970 through 1977. Plaintiff illustrated his testimony on this issue by reference to the Form 1040, Schedule C tax returns, allegedly filed by plaintiff for the tax years in question. These returns list income which plaintiff attributed to earnings from his consulting activities, and expenses which were incurred by plaintiff in the course of RCS' business of prosecuting patent applications and rendering engineering consulting services. These expenses included depreciation on equipment, taxes, California franchise tax, repair expenses for Mr. Constant's automobile, depreciation on the portion

of Mr. Constant's personal residence used as the RCS offices, Mr. Constant's safety deposit box fees, patent and legal fees, professional dues, subscriptions to professional publications, and other miscellaneous deductible business expenses.

On cross-examination, plaintiff admitted that RCS was engaged in the prosecution of between 30 and 35 patent applications unrelated to the '557 patent during this period, and that a significant portion of the expenses reported in the tax returns in question were wholly unrelated to the '557 invention. Thus, plaintiff has made no attempt to allocate the expenses reported on these tax returns to business activities related to the '557 patent.

When asked how the business losses reported in the RCS tax returns could be attributed to the imposition of the secrecy order, plaintiff suggested that had he been successful in obtaining contracts for the development and sale of the '557 invention, contract revenues would have been available to offset these various personal business expenses.

Even if plaintiff had fairly allocated a portion of RCS's business expenses to the marketing activities associated with plaintiff's attempt to commercialize the '557 invention, these expenses would not be recoverable as damages caused by the imposition of the secrecy order. As previously noted, the court concludes that the secrecy order did not substantially affect plaintiff's ability to market the '557 invention. Since the secrecy order was not a factor in plain-

tiff's business failures associated with the '557 invention, no nexus exists between the imposition of the secrecy order and the business losses of RCS.

4. Interference with the Right to Compete

As a further ground for relief, plaintiff argues that some intrinsic value exists in the right to compete in the marketplace. Plaintiff further asserts that, as a result of the imposition of the secrecy order in question, plaintiff was prevented from competing in the automatic vehicle identification market. Plaintiff concludes that the value inherent in plaintiff's right to compete was thus appropriated by the United States, necessitating an award of damages under 35 U.S.C. Section 183.

However, plaintiff has not indicated any additional actual damages alleged to have been suffered as a result of this interference, nor supplied any basis upon which damages for this species of interference could be calculated.

As a practical matter, the court is unable to perceive any meaningful difference between this element of plaintiff's claimed damages and the damages allegedly resulting from the "interference with business opportunities" previously discussed. As noted supra, plaintiff has failed to adduce any probative evidence which would tend to show that actual injury resulted from the imposition of the secrecy order. Thus, whether the act complained of, the imposition of the secrecy order, is termed "interference with business opportunities," the result here is identical.

To the extent that plaintiff seeks a conjectural or nominal award for the infringement of plaintiff's "right to compete," plaintiff's claim must be rejected. As this court has previously indicated, "actual damages" must be proven as a prerequisite to recovery under the statute. Constant, supra.

5. Delay in Filing Foreign Patent Applications

As the final element in plaintiff's claimed damages, plaintiff seeks compensation for the delay in filing foreign patent applications caused by the imposition of the secrecy order. The delay of plaintiff's foreign application process is uncontested. However, plaintiff did not demonstrate any actual injury which resulted from this delay. Apparently, upon rescission of the secrecy order, plaintiff caused patent applications to be filed in Great Britain, France,

West Germany, and Japan. According to the record, patents issued upon the British and French applications, the West German application was expressly abandoned, and the Japanese application is still pending. No other evidence was adduced in relation to this issue, and on this record, the court finds that plaintiff has failed to prove compensable injury resulting from the delay caused by the imposition of the secrecy order.

III. CONCLUSION

In the opinion of the court, defendant's motion to dismiss plaintiff's petition for insufficiency of evidence is well-founded. Plaintiff's evidence provides little or no support for his theory of recovery. For the most part, the vast market envisioned by plaintiff for AVI technology has never materialized. This fact alone renders plaintiff's emphasis up-

on the timing of the secrecy order largely irrelevant. Plaintiff's ultimate failure to find buyers for his invention cannot, on this record, be attributed to the interference caused by the secrecy order.

On the basis of the credible and competent evidence of record, the court concludes that plaintiff has failed to prove the "actual damages" required for recovery under 35 U.S.C. Section 183.

Constant v. United States, 223 Ct. Cl. 148, 617 F. 2d 239 (1980); See also, Lear Siegler, Inc. v. United States, Ct. Cl. No. 488-79C (Order of October 17, 1980).

Accordingly, plaintiff's petition is dismissed.

CONCLUSION OF LAW

Upon the findings and foregoing opinion, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

FINDINGS OF FACT

1. This action is brought by James N. Constant (plaintiff) against the United States of America (defendant) pursuant to 35 U.S.C. Section 183. Plaintiff seeks compensation for damages alleged to have been caused by defendant's imposition of a secrecy order under 35 U.S.C. Section 181 against the contents of a patent application which later issued as U.S. Patent No. 3,691,557.

2. U.S. Patent No. 3,691,557 (the '557 patent), entitled "System for Identifying Objects Using an Encoding Array for Each Object," was issued on September 12, 1972, on the basis of Application Serial No. 870,598, filed on September 22, 1969, in the name of James N. Constant, inventor.

3. Plaintiff has retained all rights to the '557 patent since the filing date of Application Serial No. 870,598.

4. Pursuant to a request by the Armed Services Patent Advisory Board, the Patent Office issued a secrecy order on May 18, 1970, forbidding the disclosure of the contents of Application Serial No. 870,598. As provided by 35 U.S.C. Sections 181, 182, 185 and 186, plaintiff was ordered to prevent the disclosure of the invention set forth in the application, or any material information relating to the invention, to any person not cognizant of the invention prior to the date of the secrecy order, under penalty of fine, imprisonment, or forfeiture of all patent rights in the invention.

5. In conjunction with the secrecy order, the Patent Office issued a document known as "Permit A," which allowed plaintiff to disclose his invention to:

(a) Any officer or employee of any department, independent agency, or bureau of the Government of the United States; or

(b) Any person designated specifically by the head of any department, independent agency or bureau of the Government of the United States, or by his duly authorized subordinate, as a proper individual to receive the disclosure of the above indicated application.

However, the permit required plaintiff to ensure that all reasonable safeguards would be taken to prevent unauthorized disclosure of the invention.

6. Pursuant to 37 C.F.R. Section 5. (1970), plaintiff petitioned the Commissioner of Patents on May 23, 1970, requesting that the secrecy order be rescinded. The text of that letter is set forth below:

I hereby petition you to remove the subject secrecy order on the grounds that the order is secretive, vain, futile, causes immediate damage present and future, is inhibitory, confiscatory, and unjust.

The order is secretive since it does not specify the exact way in which the National Security may be compromised [sic] through unauthorized disclosure of the reference application. Your petitioner is left only to assume the connection between the reference application and the National Security. Your petitioner declares his desire to submit his activity, property, and livelihood [sic] to the National Interest provided it can be shown that the reference application impacts same. The order does not reveal the connection between the reference application and the National Security.

The order is vain since it restricts the use of common ideas over specific or preferred hardware configurations disclosed or claimed in the reference application and drawings. No portion of the disclosure can possibly or conceivably be used against the National Interest. How can a device proposed to read labels off boxcars, containers, cars,

assembly line products, and objects in general, be used against the National Interest. Your petitioner can only assume that certain ideas presented in the reference application must have attracted the agency, causing the order, to claim some possible remote bearing to the National Security. Such ideas, however, have already been published in the common literature (Enclosures 1, 2, and 3), to with the concept of synthetic radar as it applies to planes flying over target areas, certainly not as it may apply to reading labels off [sic] objects. Such common ideas are now restricted by the order.

The order is futile since it restricts public facts. It is a well known public fact (Enclosures 1, 2, and 3) that synthetic microwave and optical radar achieves a high degree of resolution of objects within its beam. Such public facts are therefore available to all inside our [sic] outside the Public Interest. The order restricts such public facts.

The order causes immediate damage present and future since it restricts free legitimate commercial enterprise. The disclosure in the reference application is the basis for the formation and

sustenance of a private corporation with present employees (9), commitments [sic] for financing (\$1,500,000), commitments [sic] to research and development in-house and with suppliers (\$50,000), business proposals in force (\$900,000), business proposals in preparation (\$1,000,000), preproposal business inquiries (73) with total forecasts of doing a \$5,000,000 yearly business by 1976, and with current and committed overhead, general, and administrative expenses (\$1,000 daily). This activity is now restricted [sic] by the order.

The order is inhibitory since it restrains free trade and thereby prevents gain by reason of competitive technical advantage. At present, potential application of the disclosure in commerce enjoys limited or no competition and consequently has technical advantage. This advantage, its present and future value, will decrease and dissipate with time. This advantage is now restricted by the order.

The order is confiscatory since it cancels property (reference application) rights. The reference application is the property of the applicant both prior to and

following allowance of patent rights and certainly must be presumed to be his property up to such time as his application may be disallowed. The order restricts commercial activity based upon the unlimited, unrestricted, use of the applicant's property rights

The order is unjust since it does not provide for the compensation of property (reference application) taken ostensibly for the public use. U.S.C. Title 35 Section 183 indicates that the applicant for a patent shall have the right to apply for compensation to the head of the department or agency who caused the order to be issued, beginning at the date said applicant is notified that, except for said order, his application is otherwise in condition for allowance. The order restricted compensation for damage for the period following the order date only upon allowance and offers no compensation if the patent application is disallowed. Commercially speaking, whether allowance is made or is not is immaterial since the early exploitation of technical advantage is what counts and its restriction by the order does not provide for compensation of this damage whether a patent is granted or not. The

order restricts compensation for commercial damage whether or not the reference application is allowed.

Your petitioner, James N. Constant, a citizen of the United States, a resident of Claremont, California, whose postoffice [sic] address is 1603 Danbury Drive, urgently prays that you remove secrecy order dated 18 May, 1970, imposed against the reference application. No contract between the Government and applicant has existed in the past or now exists.

7. On November 23, 1970, plaintiff petitioned the Commissioner of Patents for a permit authorizing disclosure of the invention set forth in Application Serial No. 870,598 to legal counsel for the purpose of pursuing legal and administrative claims against the government in connection with the imposition of the secrecy order.

8. By letter of April 15, 1971, Mr. E. M. Drazdowsky, an employee of the Security Group, Licensing and Review, of the U.S. Patent Office, informed plaintiff that plaintiff's petition for rescission of the secrecy order had been denied.

9. On April 26, 1971, the U.S. Patent Office issued a permit authorizing plaintiff to disclose the contents of Application Serial No. 870,598 to the law firm of Harris, Kiech, Russell and Kern of Los Angeles, California.

10. By letter of June 8, 1971, plaintiff, by his authorized attorneys, appealed the denial of his petition for rescission of the secrecy order to the Secretary of Commerce pursuant to 35 U.S.C. Section 181 and 37 C.F.R. Section 5.8 (1971)

11. Plaintiff's appeal of the denial of his petition for rescission of the secrecy order, as prepared by legal counsel, comprises two and one-half pages of single-spaced text.

12. At trial, plaintiff introduced cancelled checks endorsed by the law firm of Harris, Kiech, Russell and Kern, payee. These checks totaled \$705.35. Plaintiff testified that this sum represented the legal fees expended by plaintiff in attempting to obtain rescission of the secrecy order.

13. Plaintiff has not alleged that the imposition of the secrecy order was an abuse of discretion or an act in excess of the authority delegated to the Commissioner of Patents.

14. On August 27, 1971, the secrecy order in question was rescinded by the U.S. Patent Office, and prosecution of patent Application No. 870,598 was continued. The secrecy order had been in effect for a period of approximately 15 months.

15. The invention disclosed in the '557 patent is a system for the identification of moving object. The system includes a synthetic aperture radar transmitter, operating at microwave frequencies, which scans a label attached to the moving object. The label consists of an array of metallic dipoles of a length one-half that of the wavelength of the electromagnetic signals produced by the microwave transmitter. The dipoles in the array can be arranged in a sequence which permits the encoding of information in the array. When scanned or illuminated

by the transmitter signals, a given dipole in the array produces a resonant pulse which is detected by a receiver. The sequence of such resonant pulses can then be processed and decoded to provide an identification of the object to which the dipole array, or label, is affixed.

16. As described by plaintiff, possible applications of the invention disclosed in the '557 patent include various types of vehicle identification systems. In these applications, known as automatic vehicle identification (AVI), labels containing the dipole array are affixed to moving vehicles, and scanned by a fixed transmitter/receiver, or interrogator, as the vehicle moves past the interrogator. By decoding the information reflected by the label to the interrogator, the vehicle can be identified.

Analogous applications include the automatic identification and monitoring of shipping containers, parcels, mail, or components moving along conveyors in assembly operations.

17. According to plaintiff, the advantages of the '557 patent invention include modest label size relative to the object to be identified, high resolution, and limited utilization of the radio frequency spectrum. A particular advantage of the '557 invention when compared to optically based AVI systems is its ability to scan the identification label when the label is obscured by dirt, snow, or other environmental conditions which compromise the operation of systems relying upon reflected signals in the visible portion of the electromagnetic spectrum.

18. In 1967, the Association of American Railroads (AAR) adopted a vehicle monitoring system known as ACI, for automatic car identification. This system relied upon optical technology, in which a trackside scanner "read" labels on the sides of rolling stock. Each label consisted of several colored bands, which were oriented such that variations in length and color could serve as the basis for coding information. By 1970, virtually all U.S. railroad were committed to implementing the ACI system. According to a study released in March 1972, 92 percent of the U.S. freight cars sampled were labeled with ACI labels by July 1971.

Thus, despite the apparent advantages of plaintiff's invention relative to the optical ACI system, the railroad industry did not constitute a receptive market

for the '557 invention during the period in which the secrecy order was in effect.

19. Between March 1970 and May 1970, plaintiff contacted various suppliers of electronic equipment to determine suitable sources of the components needed to construct a prototype of the '557 invention. However, during the period in which the secrecy order was in force, plaintiff did not purchase any such components. Moreover, the record does not indicate that any appreciable investment in equipment or supplies took place prior to the imposition of the secrecy order.

20. In July 1967, plaintiff formed a company known as RCS Associates, Inc. (RCS), which was subsequently incorporated in November 1968. According to a 5-year plan prepared by plaintiff in 1970, the business of RCS was to include engineering consulting services, research and develop-

ment of novel radar, computer, and communications systems, and marketing certain proprietary technologies developed by RCS, including the '557 invention.

Plaintiff has been the president and sole shareholder of RCS since the company's formation. As of the date of trial, no income had ever been earned by RCS which was not the result of consulting services personally performed by plaintiff.

21. Prior to the date the secrecy order was imposed, plaintiff had received several letters of inquiry from persons to whom he had forwarded unsolicited proposals describing the '557 invention. However, as of the date of the secrecy order, plaintiff had accepted no offers of contracts for the manufacture or sale of systems embodying the '557 invention, nor had any person tendered an offer of contract.

22. During 1970, plaintiff sought bank financing for RCS, in order to obtain sufficient capital to begin construction of a prototype AVI system. However, each financial institution contacted declined to offer such financing. The record does not indicate that the secrecy order had any effect on plaintiff's ability to obtain such financing. In fact, one institution noted that plaintiff's financing request amounted to a request for equity capital, which the institution did not consider to be a proper use of bank financing.

23. As an alternative means of financing a prototype of the '557 invention, plaintiff, through RCS, unsuccessfully sought to obtain study or development contracts with agencies of the United States Government or private corporations with possible interest in the AVI system.

24. During the time that the secrecy order was in effect, plaintiff did not petition the Commissioner of Patents for a permit to disclose the contents of the '557 patent application to persons other than those listed in "Permit A." 37 C.F.R. Section 5.5 specifically provides for the issuance of such a permit or modification of the secrecy order in appropriate circumstances.

25. On July 30, 1970, RCS Associates was invited to submit a proposal to the Urban Mass Transportation Administration of the Department of Transportation for the valuation and testing of an Automatic Vehicle Monitoring System. The purpose of the study was to study vehicle location technologies and demonstrate their feasibility in an urban environment. Plaintiff submitted a proposal on August 17, 1970, which was rejected on December 23, 1970.

The letter which informed plaintiff that the proposal had been rejected noted that the RCS AVI system as proposed was not considered to be "within the zone of technical superiority being considered for further negotiation."

26. On February 24, 1970, plaintiff submitted an unsolicited proposal to the former Post Office Department, outlining a plan designed to determine the feasibility of implementing the RCS AVI system in postal applications. Following review by Post Office Department technical personnel, the proposal was rejected on August 3, 1970, as impractical for letter mail applications.

27. On April 21, 1970, plaintiff submitted an unsolicited proposal to the Federal Railroad Administration, outlining a plan to study the possibilities of implementing the RCS AVI system as a

• railroad vehicle identification system. However, this proposal was rejected on August 13, 1970, on the basis that plaintiff's AVI system was not yet reduced to practice.

28. On August 26, 1970, plaintiff submitted an unsolicited proposal to the Federal Highway Administration, which outlined a plan to design and build a prototype AVI system using the technology later disclosed in the '557 patent. However, citing a lack of interest and funding, the agency declined to conduct a complete evaluation of the plan and rejected the proposal on October 23, 1970.

29. Plaintiff continued to present unsolicited proposals to various United States corporations during the period in which the secrecy order was in effect. However, no contracts or offers of contracts resulted from these attempts.

30. On February 22, 1971, plaintiff filed a petition with the Commissioner of Patents and Trademarks, requesting that the Commissioner:

order the agency requesting the issuance of a secrecy order against the reference application to file on his behalf without further delay patents [sic] applications in the following foreign countries: Australia, Belgium, Canada, Denmark, France, Germany, Hong Kong, Italy, Japan, Netherlands, Sweden, Switzerland, Taiwan, United Kingdom, Union of South Africa, and others as may be designated from time to time by your petitioner and that said patents [sic] applications be filed in these countries * * * by no later than 1 April, 1971, as time is of the utmost essence.

However, no action was taken on plaintiff's petition.

31. During the time that the secrecy order was in force, plaintiff did not petition the Commissioner of Patents for a license to file foreign applications disclosing the '557 inven-

tion, as provided by 35 U.S.C. Section 182 and 37 C.F.R. Section 5.5.

Following rescission of the secrecy order, plaintiff filed applications covering the '557 invention in the United Kingdom, France, West Germany, and Japan. At trial, plaintiff testified that patents were issued in the United Kingdom and France, that the West German application was abandoned, and that proceedings were still pending in Japan.

32. After the secrecy order had been rescinded, plaintiff was invited to demonstrate the AVI system later disclosed in the '557 patent to officials of the Port of New York Authority in a preliminary screening test known as the Automatic Bus Identification Project. However, plaintiff was unable to construct and demonstrate a prototype by the deadline of March 15, 1972.

33. In 1972 plaintiff built a prototype of the '557 invention at a cost of approximately \$15,000. This cost represented the costs of parts only, and did not reflect the value of plaintiff's personal time contributions to the project.

34. On February 2, 1973, the United States Army Mobility Equipment Research and Development Center issued a Request for Quotations, seeking bids for the development of a prototype "Container Reporting and Supply Management System," which contemplated a type of automatic container monitoring and control system. RCS Associates was one of the sources solicited. On February 26, 1973, RCS Associates, under cover of a letter written by plaintiff, submitted a proposal for consideration. However, on July 18,

1973, plaintiff was informed that the proposal of RCS Associates had been rejected. The letter of rejection noted:

Your proposal ignored the more developmental portion of the RFQ * * * and deviated significantly from the solicitation terms and conditions in respect to both the remaining technical content as well as general contractual areas. The Government has been unable to accept the RCS conditions as enumerated in the Cost and Contractual Data portion of the proposal. This installation does not primarily regard this procurement as a "best-efforts" requirement and cannot waive any regulatory and/or statutory terms with respect to its performance. Your proposal conveyed an impression of negativity and lack of confidence in meeting RFQ requirements. Furthermore, you completely failed to address several major performance areas, did not appear to satisfy technical requirements in certain facts that were addressed (i.e., reading distance, label size, system ruggedness, label-to-interrogator resolution), and were unable to effect reliability in such

characteristics as system accuracy and system performance in uncontrolled environments. Although your scientific approach is basically sound, its effect had been negated by a preponderance of unacceptable factors.

35. Plaintiff admitted at trial that subsequent to 1973, neither plaintiff nor RCS made any serious effort to enter the AVI or AVM markets.

36. On January 31, 1977, the American Association of Railroads issued a Request for Proposals (RFP), inviting plaintiff and other companies to submit proposals for ACI systems to be implemented on U.S. railroads. Plaintiff testified at trial that RCS Associates did not respond to this request.

37. RCS reported losses on its federal income tax returns for the years 1970, 1972, 1973, 1974, 1975, 1976 and 1977. However, at trial plaintiff admitted

that the expenses of operating RCS reported on these returns could not be allocated to the promotion of the '557 invention. During this period, RCS was involved in the prosecution of some 30 other patent applications, as well as other activities unrelated to the '557 invention.

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JAMES N. CONSTANT,

PLAINTIFF/PETITIONER

v.

THE UNITED STATES

DEFENDANT/RESPONDENT

PROOF OF SERVICE

I, James N. Constant, petitioner/
plaintiff herein, do hereby certify
under penalty of perjury that, pursuant
to Supreme Court Rule 28.4(a), I served
copies of the foregoing Petition for
Writ of Certiorari upon the United
States by:

(i) Mailing three copies in an envelope addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530; and

(ii) Mailing three copies in an envelope addressed to Vito J. Dipietro, Esq., Commercial Litigation Branch, Civil Division, Department of Justice, Washington, D.C. 20530.

I further certify under penalty of perjury that all of the foregoing copies were mailed by depositing them in the United States mail, with first-class postage prepaid on this 7th day of October, 1983.

I further certify under penalty of perjury that copies of the Petition for Writ of Certiorari, on 8 1/2" X 11"

paper, were served upon the United States
by mailing such copies to the persons
and in the manner set forth above on
September 21, 1983.)

Executed on October 7, 1983.



James N. Constant